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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

COLUMBIA PICTURES
INDUSTRIES, INC., *et. al.*

Plaintiffs.

V.

GARY FUNG *et al*

Defendants.

DISCOVERY MATTER

The Honorable Jacqueline Chooljian

Case No. CV-06-05578 SVW (JCx)

**EX PARTE APPLICATION FOR
PROTECTIVE ORDER RE RULE
30(b)(6) DEPOSITIONS – FEES
REQUESTED**

Trial Date: November 5, 2013

NOTICE OF APPLICATION

2 **PLEASE TAKE NOTICE** that the above-named Plaintiffs hereby move *ex* *parte*
3 for an order (i) limiting Defendants' Rule 30(b)(6) deposition topics as set
4 forth in the proposed order, and (ii) awarding Plaintiffs their reasonable costs and
5 attorneys' fees for the filing of this application. This Court has already granted a
6 protective order to Plaintiffs – and sanctioned Defendants – with regard to many of
7 the same topics in Defendants' deposition notice. Defendants' brazen attempt to
8 violate the Court's protective order is yet another instance of Defendants' serial
9 disregard of this Court's orders. Furthermore, numerous topics in Defendants'
10 deposition notice demonstrate Defendants' intent to re-litigate the liability issues
11 that were already resolved by the Court and the Ninth Circuit, or are otherwise
12 irrelevant or overbroad.

13 Plaintiffs are seeking *ex parte* relief because trial is scheduled to begin on
14 November 5, 2013, and Defendants have noticed at least eight depositions, set to
15 commence on October 8, 2013. Accordingly, there is no time for this request to be
16 heard on the normal calendar or pursuant to the parties' stipulation regarding *ex*
17 *parte* filings (ECF # 611). Given the deposition schedule, Plaintiffs respectfully
18 request that the Court rule hear this application by October 7, 2013 and by no later
19 than October 8, 2013 to the extent the Court requires a hearing. The parties met and
20 conferred on September 25 and 26 concerning Defendants' latest notice; yet
21 Defendants were unwilling to withdraw or limit the offending deposition topics.
22 Counsel for the Defendants have received notice of this *Ex Parte* Application
23 pursuant to Local Rule 7-19.1, and have indicated they intend to oppose it.
24 Plaintiffs have consented that Defendants' opposition to this application can be filed
25 by noon PST on October 3, 2013 with Plaintiffs' Reply due by noon PST on
26 October 4, 2013.

27 This *Ex Parte* Application is based on this Notice, the accompanying
28 Application; the accompanying Declaration of Gianni P. Servodidio and exhibits; all

1 pleadings on file with the Court; all matters of which the Court may take judicial
2 notice; and all such additional evidence and argument as may be presented to the
3 Court during any hearing.

4 Dated: October 1, 2013

Respectfully submitted,

5 JENNER & BLOCK LLP

6 By: /s/ Gianni P. Servodidio
7 Gianni P. Servodidio

8 STEVEN B. FABRIZIO
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EX PARTE APPLICATION

2 This Application seeks a protective order limiting Defendants' recent Rule
3 30(b)(6) deposition notice which contains 36 topics, the overwhelming majority of
4 which are irrelevant to any issues in this case. *See Ex. A*¹ (Defendants' Notice of
5 Deposition of Plaintiffs Pursuant to Fed. R. Civ. P. 30(b)(6)) ("Current Notice").
6 ***Indeed, many of Defendants' topics are already barred by a prior protective order
7 entered by Your Honor earlier in the case striking many of the same topics from
8 Defendants' first Rule 30(b)(6) deposition notice and sanctioning defendants. See
9 Ex. B (Plaintiffs' Notice of *Ex Parte* Application and *Ex Parte* Application for
10 Protective Order re Rule 30(b)(6) Depositions – Fees Requested, ECF # 205)
11 (August 1, 2007) ("First Protective Order Application"); Ex. C (Order re Plaintiffs'
12 and MPAA's *Ex Parte* Application for Protective Order Re Rule 30(b)(6)
13 Depositions – Fees Requested, ECF #207) (August 5, 2007) ("Protective Order").***

14 Defendants' Current Notice also contains a number of new topics that are
15 improper for reasons independent of the Protective Order. For example, Defendants
16 seek discovery on issues that have already been resolved at the liability phase of this
17 case, Current Notice Topics 1, 5, 14, and 36; affirmative defenses that fail as a
18 matter of law, *id.* at Topic 25; and patently irrelevant topics such as the identities of
19 all of Plaintiffs "officers, directors and employees." *Id.* at Topic 21.

20 It is plain from the number, breadth, and irrelevance of Defendants' 36 topics
21 that they do not reflect a good-faith effort to gather relevant information. Rather,
22 they merely seek to increase the burden on Plaintiffs' witnesses, and assist
23 Defendants in their effort to delay a trial set for November 5, 2013. As explained
24 above, Plaintiffs seek *ex parte* relief because Defendants' Rule 30(b)(6) depositions

²⁶ ²⁷ ¹ Throughout this Application, “Ex.” refers to an Exhibit to the Declaration of Gianni Servodidio filed herewith.

1 are set to begin on October 8, 2013 which is the only time they can proceed given
 2 the pending November 5, 2013 trial date.² Plaintiffs respectfully request that the
 3 Court rule consider this Application prior to October 8 so that Plaintiffs' witnesses
 4 are not forced to answer questions on Defendants' irrelevant and inappropriate
 5 topics.

6 **BACKGROUND**

7 This is the third time that Your Honor has had to address an overbroad Rule
 8 30(b)(6) deposition notice served by Defendants or their counsel. As the Court may
 9 recall, this case is closely similar to a case brought by Plaintiffs against another
 10 pirate BitTorrent operator captioned *Columbia Pictures Industries, Inc. v. Bunnell*,
 11 No. 06-1093 FMC (JCx) (C.D. Cal.) ("Bunnell"). Several of Defendants' counsel in
 12 this action also represented the *Bunnell* defendants, and Your Honor adjudicated
 13 several discovery disputes in *Bunnell* in parallel with this case.

14 One of those disputes arose out of the *Bunnell* defendants' overbroad Rule
 15 30(b)(6) deposition notice, which contained a staggering 98 topics. Plaintiffs filed
 16 an application for a protective order on the grounds that, *inter alia*, many of the
 17 topics were overbroad and irrelevant to any issues in the case, as Your Honor or the
 18 District Court had already held as many as four times. Ex. D. Your Honor granted
 19 Plaintiffs a protective order barring the *Bunnell* defendants from asking questions on
 20 numerous topics. Ex. E.

21 Within a matter of days of the issuance of the Protective Order in *Bunnell*,
 22 these Defendants, represented by the same counsel, served a Rule 30(b)(6)

24 ² Defendants have filed multiple applications with the Court seeking to adjourn this
 25 date and the Court has not given any indication that the trial in this case will be
 26 moved. To the contrary, at a hearing before Judge Wilson on Monday, September
 27 30, 2013, the Court indicated clearly that it intended the damages trial to begin on
 November 5th, as ordered.

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1 deposition notice in this case, mirroring the deposition notice already subject to the
 2 protective order in *Bunnell* with only a transparent attempt to limit the number (but
 3 not the subject matter) of the categories. Ex. F (Defendants' Notice of Deposition of
 4 Plaintiffs) ("First Deposition Notice").

5 In response, Plaintiffs promptly filed an *ex parte* application for a protective
 6 order, and requested sanctions. Ex. B (First Protective Order Application). In their
 7 application, Plaintiffs raised two categories of objections to the topics in
 8 Defendants' First Deposition Notice. With regard to a subset of the topics in that
 9 Deposition Notice (Nos. 10-13, 24, 25, 28, 29, 31), Plaintiffs argued that the topics
 10 were premature, and that discovery (and disputes) with respect to the subject matter
 11 of those topics should be delayed until the damages phase of the case.³ However,
 12 this Court also issued the Protective Order with respect to numerous topics that
 13 were, in whole or in part, irrelevant to the case for *any purpose whatsoever* –
 14 whether at the liability phase or the damages phase. Plaintiffs' current application
 15 only applies to these latter topics ruled to be irrelevant or improper for all purposes
 16 (and of course to some wholly new topics that are equally objectionable). These
 17 topics can be divided into categories as follows:

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- 19 • **Topics related to Plaintiffs' efforts to investigate copyright**
- 20 **infringement.** *See* Protective Order, Stricken Topics 1, 3, 6; Protective
- 21 Order Application, at 2-4.

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³ Obviously, Plaintiffs do not contend that this portion of the Court's Protective Order applies with respect to damages-related topics and, subject to any new objections, have agreed to produce a knowledgeable witness as to any appropriate damages topics. *See* Ex. H (objections to 30(b)(6) Notice). For instance, Plaintiffs objected to Topic 29 in the First Deposition Notice, which addressed copyright registrations, on the ground that it was relevant to the damages phase. First Protective Order Application, at 10. Topic 31 in the Current Notice addresses copyright registrations, and Plaintiffs are not objecting to that topic now.

- **Topics related to Plaintiffs' efforts to prevent copyright infringement by Defendants.** *See* Protective Order, Stricken Topics 1, 17, 27; Protective Order Application, at 2-4 (Stricken Topic 1); *id.* at 14-16 (Stricken Topic 17); *id.* at 19-20 (Stricken Topic 27).
- **Topics related to Plaintiffs' use of BitTorrent technology.** *See* Protective Order, Limited Topics 4, 5; Protective Order Application, at 6-8.
- **Topics related to Plaintiffs' marketing and distribution on the Internet.** *See* Protective Order, Limited Topic 14; Stricken Topic 23; Protective Order Application, at 12-13 (Limited Topic 14); *id.* at 18 (Stricken Topic 23).

The Court adopted Plaintiffs’ proposed order on these topics *in toto*. See Protective Order. In particular, the Court struck topics relating to Plaintiffs’ effort to prevent infringement or investigations of Defendants (Stricken Topics 1, 3, 6, 17, and 27), on the grounds that they were irrelevant to any issues in the case—not that discovery should be deferred until a later phase of the case. The Court also narrowed Limited Topics 4, 5, and 14 relating to online promotional efforts or distribution of Plaintiffs’ works, holding that Defendants were not permitted to ask any questions on these topics, “except that defendants are permitted to ask questions regarding whether plaintiffs have authorized general or unrestricted distribution or availability over the internet of all or part of plaintiffs’ copyrighted works alleged in the Complaint or listed in the attachment to the Complaint (and any others for which plaintiffs are claiming defendants infringed).” *Id.* at 1.

Finally, the Court sanctioned Defendants for serving their First Notice and ordered them to pay Plaintiffs' attorneys' fees. *Id.* at 2. As Plaintiffs explained in their application, Defendants' notice "include[d] . . . multiple categories devoted to

1 topics the Court repeatedly has ruled to be irrelevant,” such as “every online license
 2 ever granted by any plaintiff.” Protective Order Application, at 1.⁴

3 Following this Order, the Court granted summary judgment, holding
 4 Defendants liable for inducement of copyright infringement. *Columbia Pictures*
 5 *Industries, Inc. v. Fung*, No. CV 06-5578 SVW(JCx), 2009 WL 6355911, at *19
 6 (C.D. Cal. Dec. 21, 2009) (“*Fung I*”). In its Order, the Court rejected Defendants’
 7 DMCA defense, finding that notices were not required at all and that Defendants
 8 were ineligible for the DMCA safe harbor as a matter of law without regard to
 9 notices. *See Fung I*, 2009 WL 6355911 at *15-18. The Ninth Circuit affirmed the
 10 liability decision, holding that Defendants were not entitled to any DMCA defense
 11 as a matter of law. *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1039-47
 12 (9th Cir. 2013) (“*Fung II*”).

13 Notwithstanding the Protective Order and the later liability rulings by the
 14 Court and Ninth Circuit, Defendants served their Current Notice on September 20,
 15 2013 seeking to require Plaintiffs to designate a witness with respect to many of the
 16 same topics stricken from the First Deposition Notice or rendered moot based on the
 17 Court’s summary judgment opinion. If anything, these topics are even more
 18 objectionable in this stage of the case, after the Court has already ruled on liability
 19 issues. For the reasons set forth herein, the Court should issue a new protective
 20 order in advance of these new depositions, which are scheduled to commence on
 21 October 8, 2013, and once again sanction Defendants for seeking this needless and
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 24 ⁴ Defendants appealed all aspects of the Court’s Protective Order to Judge Wilson
 25 who affirmed this Court’s ruling in full. *See In Chambers Order re Defendants’*
 26 *Objections to and Motion For Review of Magistrate Judge’s “Order re Plaintiffs’*
 27 *and MPAA’s Ex Parte Application for Protection Order re Rule 30(b)(6)*
 28 *Depositions – Fees Request*”, ECF # 277.

1 irrelevant discovery without any justification in contravention of the Protective
 2 Order.

3 **ARGUMENT**

4 **I. Defendants Should Be Precluded From Asking Questions on Irrelevant
 5 Topics Already Subject To The Protective Order.**

6 The Current Notice Topics covered by the Protective Order can be grouped
 7 into the following categories: (i) topics concerning Plaintiffs' investigation of
 8 Defendants' illegal behavior; (ii) topics concerning whether Plaintiffs expended
 9 sufficient effort in halting Defendants' illegal behavior, (iii) topics concerning
 10 Plaintiffs' use of BitTorrent, and (iv) topics concerning Plaintiffs' distribution of
 11 copyrighted works.

12 As explained below, this Court already has held on repeated occasions that
 13 these topics have no place in this litigation. Defendants should be precluded from
 14 seeking to redo this Court's relevance determinations now, particularly following
 15 the rulings by the District Court and Ninth Circuit that affirm the rationale for the
 16 Court's issuance of the Protective Order. *See, e.g., Ingle v. Circuit City*, 408 F.3d
 17 592, 594 (9th Cir. 2005) (applying law of the case doctrine).

18 a. Defendants Should Be Precluded From Asking Topics Related To
 19 Plaintiffs' Efforts to Investigate Infringement

20 Defendants have noticed two topics addressing Plaintiffs' efforts to
 21 investigate copyright infringement. Here are those topics, as compared with the
 22 topics for which the Court has already granted a protective order:

23 Previously Stricken or Limited Topics	Topics in Current Notice
24 Stricken Topic 6: Any and all 25 information related to MPAA 26 and/or Plaintiffs' Investigation of 27 Defendants' Websites and defendants.	Current Notice Topic 6: Your efforts, and efforts made on Your behalf, to monitor Defendants' website to identify any material that infringes the allegedly infringed works.
28 Stricken Topic 1: Any and all	

<p>1 information related to efforts by 2 MPAA and/or Plaintiffs [t]o 3 investigate, assess, learn about 4 and/or evaluate copyright piracy 5 concerning torrent files in general, 6 and all efforts by MPAA and/or 7 Plaintiff specifically to detect, 8 assess, monitor or prevent 9 copyright piracy by users of the 10 Defendants' Websites.</p> <p>11 Stricken Topic 3: Any and all 12 information related to efforts by 13 MPAA and/or Plaintiffs to 14 investigate, assess, learn about 15 and/or evaluate whether or not 16 Torrentspy [sic] is aware of the 17 illegal nature of its website or can 18 supervise or control infringers or 19 infringement, profits from it, or 20 materially contributes to 21 infringement.</p>	<p>Current Notice Topic 34: Your spidering and monitoring of Defendants' websites since 2006.</p>
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17 With regard to these Stricken Topics, the Court accepted Plaintiffs' arguments
18 that "fundamentally, there is ***absolutely no relevance*** to plaintiffs' . . . investigative
19 process. This case is about defendants' conduct, not plaintiffs'." First Protective
20 Order Application, at 3; *see also id.* ("Information about what the plaintiffs . . . did
21 to ***investigate*** wrongdoing has no bearing on whether the defendants ***committed***
22 wrongdoing – especially here, where defendants have no affirmative defense even
23 alleging investigative malfeasance.").

24 In view of the foregoing, Defendants' Current Notice Topics, which seek
25 essentially the very same discovery with respect to Plaintiffs' highly-sensitive and
26 confidential internal investigative processes, plainly fall within the scope of the
27 Court's earlier ruling. For this reason alone, Current Notice Topics Nos. 6 and 34
28 should be stricken once again in conformity with the Court's earlier ruling. *See*

1 *Ingle*, 408 F.3d at 594 (law of case doctrine precludes court from revisiting prior
 2 decision).

3 Furthermore, even if the Court was considering this matter *de novo*, it should
 4 still grant a protective order. First, Plaintiffs named Defendants in their complaint;
 5 the mechanism by which they obtained the facts underlying the complaint is
 6 irrelevant. *See, e.g., Direct TV, Inc. v. Trone*, 209 F.R.D. 455, 459-60 (C.D. Cal.
 7 2002) (holding that, where an alleged infringer sought discovery of the antipiracy
 8 technologies used by the plaintiff to thwart efforts by infringers such as the
 9 defendant, a plaintiff's technological efforts to defeat theft are simply not relevant to
 10 an infringer's intent or culpability for the underlying theft itself); *Disney Enters., Inc. v. Hotfile Corp.*, No. 11-20427-CIV-JORDAN, ECF # 138 (S.D. Fla. Sept. 1, 2011) (issuing protective order precluding discovery movie studios' anti-piracy
 12 technology and agreeing with studios that "this case concerns [pirates'] actions, not
 13 the movie studios' behavior").

15 Second, Defendants' discovery request is an impermissible attempt to take
 16 discovery on Plaintiffs' internal and confidential investigative work product.
 17 Defendants already have received data from Plaintiffs reflecting the direct
 18 infringements of all the Works in Suit occurring through the Defendants' websites.
 19 To the extent Defendants topics seek broader discovery, they plainly intrude upon
 20 the internal and confidential methods Plaintiffs use to locate infringing files on the
 21 Internet (and, by extension, on Defendants' websites), as well as the overall legal
 22 and business strategy guiding those efforts. Disclosure of those methods to
 23 adjudicated infringers such as Defendants would severely prejudice Plaintiffs. The
 24 methods Plaintiffs use to locate and identify infringing files online are kept in close
 25 confidence because their effectiveness could be compromised were they to become
 26 known to the content thieves at whom they are directed. Plaintiffs should not be
 27 required to turn over information concerning their internal efforts to gather
 28 information to prosecute or analyze this and similar cases. *See* Fed. R. Civ. P.

1 26(b)(3)(A) (“Ordinarily, a party may not discover documents and tangible things
 2 that are prepared in anticipation of litigation or for trial by or for another party or its
 3 representative”); *In re Grand Jury Subpoena (Mark Torf/Torf Environmental*
 4 *Management*), 357 F.3d 900 (9th Cir. 2004) (applying work product doctrine);
 5 *Disney*, ECF #138 (precluding discovery into movie studios’ “monitor[ing]” of
 6 online piracy); *United States ex rel. Bagley v. TRW, Inc.*, 212 F.R.D. 554, 560 (C.D.
 7 Cal. 2003) (documents “prepared to aid the litigation of claims” are work product).

8 b. Defendants Should Be Precluded From Asking Topics Related To
 9 Plaintiffs’ Efforts to Send DMCA Notices or Prevent Copyright
 10 Infringement

11 Defendants have noticed three topics addressing Plaintiffs’ general efforts to
 12 stop online piracy, including their internal strategies and industry tactics, both
 13 through sending DMCA notices and through other means. Here are those topics, as
 14 compared with topics for which the Court has already granted a protective order:

Previously Stricken or Limited Topics	Topics in Current Notice
Stricken Topic 1: Any and all information related to efforts by MPAA and/or Plaintiffs [t]o investigate, assess, learn about and/or evaluate copyright piracy concerning torrent files in general, and all efforts by MPAA and/or Plaintiff specifically to detect, assess, monitor or prevent copyright piracy by users of the Defendants’ Websites.	Current Notice Topic 7: Your policies, efforts and practices to protect and police Your allegedly infringed works from online copyright infringement.
Stricken Topic 17: Any and all information regarding the reasons the MPAA or the Plaintiffs have avoided using the Defendants’ Websites’ DMCA procedure to remove torrent files that MPAA and/or Plaintiffs believe were/are	Current Notice Topic 14: Any policy, practice or procedure You have (or may have had in the past) that relates in any way to the Digital Millennium Copyright Act, including the submission of notices, and any ‘take down’ policies.
	Current Notice Topic 36: Your notices, if any, to Defendants other than the works in suit in this

<p>1 infringing or leading to infringing 2 files.</p> <p>3 Stricken Topic 27: Any and all 4 information related to efforts 5 made by MPAA and/or Plaintiffs 6 to remove or take off the Internet 7 or BitTorrent Network actual files 8 allegedly referenced in torrent 9 files available via the Defendants' Websites.</p>	<p>lawsuit.</p>
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10 As noted above, the Court struck these topics from the First Deposition
11 Notice, entirely accepting Plaintiffs' arguments as to the lack of relevance of
12 Plaintiffs' decision whether or not to send DMCA notices to Defendants, or
13 Plaintiffs' efforts to "prevent copyright piracy." As Plaintiffs' arguments in favor of
14 striking these topics were categorical, the ruling on the Protective Order applies
15 equally to the Current Notice. First Protective Order Application, at 3-4, 14-16, 19-
16 20.

17 Defendants' Current Notice Topics 7, 14, and 36⁵ are similar to – but even
18 *less relevant than* – the topics subject to the Protective Order. Like Stricken Topics
19 1, 17, and 27, Defendants again seek discovery on Plaintiffs' efforts to combat
20 online piracy including efforts to send DMCA notices, which all compromise highly
21 confidential internal work product information. *See infra* at 17. Moreover,
22 Defendants (again) seek to address Plaintiffs' internal prevention policies and
23 DMCA notification policies *directed to the entire world*. These topics are broad

24

25⁵ As Plaintiffs explain below, discovery on Current Notice Topics 14 and 36 is also
26 precluded by Judge Wilson's summary judgment decision and the Ninth Circuit's
27 affirmation holding that Defendants are not entitled to reply on any DMCA defense.
Infra at 18-19.

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1 enough to cover Plaintiffs' internal efforts and strategies to halt online piracy, or
 2 decisions to send DMCA requests, to other services like Napster or Limewire. And
 3 Current Notice Topic 36 covers notices with regard to works for which Plaintiffs are
 4 not even seeking damages. These topics implicate highly sensitive internal work
 5 product, which has no conceivable relevance to the damages trial.

6 Even evaluated *de novo*, Plaintiffs' current application should be granted
 7 because Plaintiffs are under no legal obligation to notify Defendants of infringement
 8 and stop Defendants from infringing Plaintiffs' copyrights, and Plaintiffs' antipiracy
 9 practices have no bearing on the sole remaining issue in the case: the amount of
 10 statutory damages owned by Defendants. *Corbis Corp. v. Amazon.com, Inc.*, 351 F.
 11 Supp. 2d 1090, 1099 (W.D. Wash. 2004) (Plaintiffs "w[ere] under no obligation to
 12 give notice of claimed infringement before filing this suit"); *Viacom Intern. Inc. v.*
 13 *YouTube, Inc.*, 718 F. Supp. 2d 514, 521 (S.D.N.Y. 2010) (DMCA "does not require
 14 use of the notice and take-down procedure . . . copyright owners are not obligated to
 15 give notification of claimed infringement in order to enforce their rights") (quoting
 16 Senate and House Reports), vacated in part on other grounds, 676 F.3d 19 (2d Cir.
 17 2012); *Home Design Services, Inc. v. Trumble*, No. 09-cv-00964-WYD-CBS, 2011
 18 WL 843900, at *3 (D. Colo. Mar. 8, 2011) (holding that copyright owner had no
 19 duty to preemptively warn individuals not to violate copyright law).

20 c. Defendants Should Be Precluded From Asking Questions On the Topic
 21 Related to Plaintiffs' Alleged Use of BitTorrent Technology.

22 Plaintiffs' Current Notice Topic 9 is virtually identical to two Stricken Topics
 23 which are already subject to the Protective Order:

24 Previously Stricken or Limited Topics	Topic in Current Notice
25 Limited Topic 4: Any and all 26 information related to relations, 27 agreements, and communications 28 with BitTorrent Incorporated or BitTorrent.com or the use of	Current Notice Topic 9: Your use of Bit torrent technology to promote Your copyrighted works.

1 BitTorrent technology by
 2 plaintiffs and others.
 3
Limited Topic 5: Any and all
 4 information related to any plan of
 5 MPAA and/or Plaintiffs to take
 6 advantage of any opportunity
 7 afforded by using BitTorrent
 8 technology.

9
 10 In the Protective Order, Your Honor precluded questioning on Limited Topics
 11 4 or 5 “except that defendants are permitted to ask questions regarding whether
 12 plaintiffs have authorized general or unrestricted distribution or availability over the
 13 internet of all or part of plaintiffs’ copyrighted works alleged in the Complaint or
 14 listed in the attachment to the Complaint (and any others for which plaintiffs are
 15 claiming defendants infringed).” Protective Order, at 1. These Topics are virtually
 16 identical to Current Notice Topic 9, which seeks discovery on “Your use of Bit
 17 torrent technology to promote Your copyrighted works.”

18 Accordingly, the Protective Order applies in full. Defendants already have
 19 deposed Plaintiffs’ witnesses in this action with respect to the narrowed category
 20 allowed by the Court. Plaintiffs have agreed to produce a 30(b)(6) witness to testify
 21 about the same topic allowed by the Court with respect to the works at issue during
 22 the damages phase of the case. Indeed, the Court specifically contemplated that
 23 Plaintiffs should do so in the Protective Order, which permitted such discovery as to
 24 “plaintiffs’ copyrighted works alleged in the Complaint or listed in the attachment to
 25 the Complaint (*and any others for which plaintiffs are claiming defendants
 26 infringed*).” Protective Order, at 1.

27 There is no reason the Court should revisit its prior decision to preclude any
 28 further testimony on this issue. In seeking the Protective Order, Plaintiffs explained
 that they “have never asserted (and in fact have specifically disavowed any

1 suggestion) that BitTorrent technology itself is somehow unlawful. This case is
 2 about conduct, *defendants' conduct*; not technology.” First Protective Order
 3 Application, at 7. That reasoning is as applicable to the damages phase as it was to
 4 the liability phase.

5 d. Defendants Should Be Precluded From Asking Questions On The
 6 Topics Related to Plaintiffs' Marketing and Distribution Strategies

7 Ten of Plaintiffs' Current Notice Topics revisit the incredibly broad issue of
 8 Plaintiffs' general distribution of content, on which this Court has already granted a
 9 protective order:

11 Previously Stricken or Limited Topics	12 Topics in Current Notice
12 Limited Topic 14: Any and all 13 information related to agreements, 14 facts, and practices involving the 15 distribution of copyrighted works 16 of any plaintiff through any peer 17 to peer technology over the Internet including but not limited to BitTorrent technology. 18 Stricken Topic 23: Any and all 19 information related to efforts by 20 MPAA and/or Plaintiffs to 21 investigate, assess, learn about 22 and/or evaluate that the Internet 23 and bit-torrent technology provide budding artists without recording company contracts with an inexpensive vehicle for communicating their work to the public.	12 Current Notice Topic 8: Your use of the Internet to promote Your copyrighted works. 13 Current Notice Topic 10: Your 14 plans, and/or the plans of any of 15 Your affiliates, to create a website 16 dedicated to the downloading 17 and/or creation of films available on the Internet. 18 Current Notice Topic 11: 19 Agreements You have entered 20 that include provisions allowing 21 any person or entity to distribute, 22 sell, license, upload, stream, 23 download and/or reproduce Your 24 copyright works. 25 Current Notice Topic 12: 26 Agreements You have entered 27 that include provisions allowing 28 any person or entity to distribute, sell, license, upload, stream, download and/or reproduce Your

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	<p>copyrighted works over the Internet.</p> <p>Current Notice Topic 13: The nature and scope of Your investments in, ownership interests in, revenue sharing and/or other financial arrangements with and/or licenses with any Internet distributors.</p> <p>Current Notice Topic 15: Your business plan(s) relating to the Internet distribution for the allegedly infringed works.</p> <p>Current Notice Topic 16: Licensing agreements, arrangements and assignments relating to the allegedly infringed works.</p> <p>Current Notice Topic 17: Distribution of the allegedly infringed works.</p> <p>Current Notice Topic 18: Viral marketing, promotion and exploitation of the allegedly infringed works.</p> <p>Current Notice Topic 22: All proposals, negotiations and agreements, between You and any and all distributors, including relating to the licensing, delivery and/or distribution of works incorporating and/or including works owned or controlled by You.</p>
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1 As noted above, the Court already ordered that Limited Topic 14 (which
 2 addresses Internet distribution) be stricken other than inquiries into whether
 3 plaintiffs have authorized general or unrestricted distribution or availability over the
 4 internet of all or part of plaintiffs' copyrighted works alleged in the Complaint or
 5 listed in the attachment to the Complaint (and any others for which plaintiffs are
 6 claiming defendants infringed)." Protective Order, at 1. The Court ordered that
 7 Stricken Topic 23 (which addresses Internet marketing strategy) be stricken in its
 8 entirety.

9 The Court should do the same here: With regard to Current Notice Topics 11,
 10 12, 16, and 17, Defendants should be precluded from asking any questions except
 11 whether plaintiffs have authorized general or unrestricted distribution or availability,
 12 which is the same subject Your Honor specifically authorized in the Protective
 13 Order, as to all of the Works in Suit. With regard to Current Notice Topics 8, 10, 13,
 14 15, 18, and 22, the Court should strike them completely.

15 The Protective Order is dispositive and should not be relitigated in the
 16 damages phase. In the Protective Order Application, with regard to Limited Topic
 17 14, Plaintiffs explained that "Defendants already know that they do not have
 18 licenses to distribute plaintiffs' copyrighted works. Unless plaintiffs have granted
 19 authorizations for 'general or unrestricted' distribution of their works such that,
 20 arguably, the rampant re-distribution of those works by defendants' users could be
 21 deemed authorized, plaintiffs' licensing arrangements with others – e.g., whether or
 22 not a plaintiff has licensed Apple's iTunes or other legitimate distributors – have no
 23 relation to any claim or defense in this action." First Protective Order Application,
 24 at 13. Plaintiffs also explained that this Court had repeatedly denied discovery on
 25 this issue in the *Bunnell* litigation as well. *Id.* at 12-13. With regard to Stricken
 26 Topic 23, Plaintiffs argued that "the topic, again, impermissibly seeks information
 27 about all of BitTorrent technology in general." *Id.* at 18. This reasoning applies
 28 equally to the damages phase of this case.

1 Here, Defendants' latest topics are even *less* relevant than the topics which
2 were subject to the Protective Order. Plaintiffs' Current Notice Topics at issue here
3 cover virtually *all* aspects of *all* of Plaintiffs' internal marketing and distribution
4 strategies regarding the marketing and distribution of thousands of films and
5 television shows. These Current Notice Topics are broad enough to encompass
6 Plaintiffs' television advertisements (Current Notice Topic 18) and Plaintiffs'
7 contracts with brick-and-mortar video stores (Current Notice Topics 16 and 22).
8 And they even go beyond marketing and distribution: in Current Notice Topic 10,
9 Defendants inexplicably seek to question Plaintiffs about their "plans" to "create a
10 website" dedicated to, *inter alia*, "creation of films." Plaintiffs are genuinely at a
11 loss as to the relevance of this topic, but in any event, Defendants' inclusion of this
12 topic is irreconcilable with the Protective Order and, as such, should be stricken.

13 Even if these topics were not precluded by the existing protective order,
14 Plaintiffs would be entitled to a new protective order. The only issues remaining in
15 this case are Plaintiffs' ownership of the copyrights on its list of works in suit,
16 whether an American user downloaded each of these works, and Defendants'
17 culpability for purposes of a statutory damages award. Defendants are entitled to
18 pose questions on whether Plaintiffs authorized, or licensed Defendants, to distribute
19 full length copies of Plaintiffs' copyrighted works; aside from that, however,
20 additional questions about Plaintiffs' distribution and marketing strategies, such as
21 "business plans related to Internet distribution" and "viral marketing," are facially
22 irrelevant to this case. *Cf. Henley v. DeVore*, 733 F. Supp. 2d 1144, 1162 (C.D. Cal.
23 2010) (noting irrelevance of Plaintiffs' decisions regarding whether to license
24 copyrighted works).

25 During the parties' meet-and-confer, Defendants insisted that Plaintiffs
26 produce a Rule 30(b)(6) witness to testify as to whether *any* employee has *ever*
27 distributed a copyrighted work to *anyone* – regardless of whether this distribution
28 was authorized. This is an overbroad and inappropriate subject for discovery.

1 There is no dispute that Plaintiffs never licensed Defendants or authorized
 2 distribution of their works on Defendants' websites or via the Internet in general.
 3 *See Ex. G (Defs' Statement of Genuine Issues in Opposition to Summary*
 4 *Judgment), at 4-5.* As such, Defendants effectively seek to impose a duty on
 5 Plaintiffs to search for a "needle in a haystack" based on the theoretical supposition
 6 that some employee may have engaged in some *unauthorized* distribution of one of
 7 the thousands of works-in-suit on the Internet. Moreover, even if Defendants could
 8 identify some aberrational instance of the distribution of a dot-torrent file by one of
 9 Plaintiffs' employees, this would be only marginally relevant at best because
 10 Defendants indexed *numerous* dot-torrent files corresponding to different infringing
 11 copies of the vast majority of the Works in Suit. *See* Plaintiffs' Motion for
 12 Summary Judgment on Direct Infringement, ECF # 622, Ward Dec., ¶ 17 ("There
 13 are typically many different dot-torrent files for the very same content – sometimes
 14 hundreds or even thousands of such files – each corresponding to a different
 15 uploader's version of that same content.") With such minimal benefit and
 16 significant burden, a protective order should be granted. *See In re Marciano*, 708
 17 F.3d 1123, 1129 (9th Cir. 2013) (noting that Fed. R. Civ. P. 26(b)(2)(C)(iii)
 18 "require[s] a protective order if the 'burden or expense of the proposed discovery
 19 outweighs its likely benefit'").

20 Finally, Defendants' Current Notice Topics 10, 13, 15, 16, 17, and 18 are
 21 inappropriate to the extent that they seek Plaintiffs' confidential commercial
 22 information such as internal business strategies for online distribution of major
 23 theatrical releases and television programming to the extent they have not been
 24 revealed to the public. "Under Federal Rule of Civil Procedure 26(c)(1)(G), the
 25 Court has discretion to "requir[e] that a trade secret or other confidential research,
 26 development, or commercial information not be revealed or be revealed only in a
 27 specified way." Plaintiffs' confidential information plainly falls within Rule
 28 26(c)(1)(G). *See, e.g., Bauer Bros. LLC v. Nike, Inc.*, No. 09cv500-WQH-BGS,

1 2012 WL 1899838, at *2 (S.D. Cal. May 24, 2012) (noting that “marketing
 2 strategies” and “product development plans” are “confidential business materials”).
 3 Given that the sole issue remaining in this case involves the proper range of
 4 statutory damages for the works in suit, Defendants cannot show *any* relevance to
 5 this closely-guarded information, let alone the requisite need for the information that
 6 would permit them to take discovery on a Rule 30(b)(6) deposition.

7 **II. Defendants Should Be Precluded From Asking Questions Foreclosed
 8 Under the Court’s Earlier Rulings**

9 a. Defendants Should be Precluded From Posing Questions On
 10 Inducement Liability and DMCA Defenses

11 Defendants have proclaimed in recent filings that they intend to relitigate
 12 settled issues such as Defendants’ liability for inducement, causation and DMCA
 13 defenses. *See, e.g.*, Defendants’ *Ex Parte* Application to Compel Plaintiffs’
 14 Responses to Discovery; Memorandum of Points and Authorities, ECF # 615, at 9
 15 (stating that Defendants intend “to challenge Plaintiffs’ arguments that acts of
 16 inducement by Defendants caused particular direct infringements”). And
 17 Defendants’ Notice includes several topics demonstrating that intent. Those topics
 18 are:

19 **Current Notice Topic 1:** The facts giving rise to
 20 Plaintiffs’ complaint in this action.

21 **Current Notice Topic 5:** Any and all infringements that
 22 You contend Defendants did not expeditiously remove
 23 and/or disable access to after such infringement was
 identified

24 **Current Notice Topic 14:** Any policy, practice or
 25 procedure You have (or may have had in the past) that
 26 relates in any way to the Digital Millennium Copyright
 27 Act, including the submission of notices, and any ‘take
 down’ policies.

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1 **Current Notice Topic 36:** Your notices, if any, to
 2 Defendants other than the works in suit in this lawsuit.

3 The first of these topics address the facts giving rise to Plaintiffs' complaint,
 4 which cover virtually all issues litigated at the liability phase. Defendants already
 5 had the opportunity to depose Plaintiffs on these issues, and should not get a second
 6 bite at the apple. *See, e.g., Greer v. Electronic Arts, Inc.*, No. C10-3601 RS (JSC),
 7 2012 WL 6131031 (N.D. Cal. Dec. 10, 2012) (declining to permit plaintiff to take
 8 supplemental Rule 30(b)(6) deposition at late stage in litigation); *Rush v. Denco*
 9 *Enterprises, Inc.*, No. EDCV 11-0030 DOC (DTBx), 2012 WL 3206674, at *3
 10 (C.D. Cal. Aug. 3, 2012) (noting that "it would be prejudicial to force Plaintiff, who
 11 was timely prepared for the summary judgment motion, to eternally relitigate this
 12 case after she legitimately prevailed on her dispositive motion.").

13 Current Notice Topic 5 reflects Defendants' theory that they cannot be liable
 14 unless Plaintiffs served notices under the DMCA. *E.g.*, Defs' Mem. in Opp. to Plfs'
 15 Mot. for Summary Judgment on Liability, ECF # 296, at 30-31, 37. As noted above,
 16 the District Court rejected this argument and the Ninth Circuit affirmed, finding that
 17 Defendants could not meet any of the DMCA safe harbor provisions as a matter of
 18 law. *Fung II*, 710 F.3d at 1044-46 (emphasis added). Thus, whether Defendants
 19 received DMCA notices simply has no bearing on any issues remaining in the case.

20 Finally, Current Notice Topics 14 and 36 not only cover the issue of DMCA
 21 notices on which Defendants have already lost, they cover *extraneous topics* related
 22 to DMCA notices: whether *third parties* receive DMCA notices (Current Notice
 23 Topic 14) or whether Defendants received DMCA notices with regard to *irrelevant*
 24 works that are not part of the damages phase of the case (Current Notice Topic 36).
 25 These topics are clearly irrelevant and should be stricken.

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b. Defendants Should be Precluded From Posing Questions On Affirmative Defenses Relating to Willfulness

Defendants' Current Notice Topic 25 pertains to their affirmative defense of "innocent infringement":

Current Notice Topic 25: All facts within Your knowledge, possession, custody or control, or to which You reasonably have access, which You may use to refute or that otherwise relate to Defendants' affirmative defense that any alleged infringement by Defendants was innocent.

9 This topic should be stricken because it seeks that Plaintiffs prepare and
10 produce a witness for a defense that has been adjudicated to be meritless. At a
11 hearing yesterday on Plaintiffs' pending Summary Judgment Motions, the Court
12 informed the parties that it will grant Plaintiffs' Motion for Summary Judgment,
13 holding as a matter of law that Defendants' conduct was willful and not innocent.
14 ECF # 561. As such, Topic No. 25 has been rendered moot.

III. **Several of Defendants' Remaining Topics Are Irrelevant Or Overbroad**

Plaintiffs also request that several other topics be either stricken or narrowed.

Current Notice Topic 20: Revenues from the allegedly infringed works.

19 This topic should be stricken. Plaintiffs are seeking *statutory* damages, which
20 focus on the Defendants' culpability, not *actual* damages, which focus on the
21 economic effect of the Defendants' actions on the Plaintiffs. Accordingly, whether
22 *Plaintiffs* are successful in earning revenues from their works is irrelevant to
23 whether *Defendants* are culpable in pirating those works. Consistent with this
24 reasoning, courts have universally denied discovery on plaintiffs' revenues in
25 statutory damages case. *See, e.g., Io Group Inc. v. GLBT Ltd.*, No. C-10-01282
26 MMC (DMR), 2011 WL 3443773, at *3 (N.D. Cal. Aug. 8, 2011) (denying
27 defendants request for discovery into plaintiffs' revenues because: "Defendant has
28 made no showing that the amount of revenues earned by Plaintiffs for any of its

1 works is relevant to the issue of damages"); *Apple Inc. v. Psystar Corp.*, 673 F.
 2 Supp. 2d 926, 928 (N.D. Cal. 2009) (noting that Plaintiff "may elect statutory
 3 damages regardless of the adequacy of the evidence offered as to its actual damages
 4 and the amount of defendant's profits," and denying discovery into plaintiff's profits
 5 because plaintiff "is not obliged to provide proof of its own profits when it has
 6 elected to seek statutory damages"); *Arista Records LLC v. Lime Group LLC*, No.
 7 06 CV 5936(KMW), 2011 WL 1486640, at *2 (S.D.N.Y. April 11, 2011) (noting
 8 denial of defendants' requests for documents sufficient to show plaintiffs' earned
 9 profits because of election of statutory damages, and relying on argument that
 10 "allowing discovery into Plaintiffs' profits and costs would be contrary to the very
 11 reason that Congress created statutory damages" (quotation marks omitted)).

12 **Current Notice Topic 21:** Your organizational structure,
 13 including divisions and entities of any kind, and the
 14 identity of its officers, directors, and employees.

15 This topic should be stricken as it is utterly irrelevant to any issues in the
 16 case. Defendants have already had the opportunity to depose Plaintiffs at the
 17 liability phase and had every opportunity to pose questions about Plaintiffs'
 18 corporate structure. One month before trial, with the sole remaining issue being
 19 Defendants' damages, Defendants should not be permitted to take basic discovery
 20 about Plaintiffs' divisions. *Greer*, 2012 WL 6131031, at *2 (declining to order
 21 supplemental 30(b)(6) deposition soon before trial and noting that the court "will not
 22 order further discovery just for the sake of ordering further discovery").

23 Furthermore, this request is overbroad, burdensome, and ambiguous.
 24 Defendants do not explain what "entities of any kind" means or how it differs from

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1 “divisions.”⁶ And Defendants’ 30(b)(6) witnesses clearly cannot be expected to
 2 answer questions about each of Plaintiffs’ hundreds of thousands of individual
 3 employees. *See Kas v. Mercedes-Benz USA, LLC*, No. CV 11-1032-GHK (PJWx),
 4 2012 WL 473931, at *2 (C.D. Cal. Feb. 1, 2012) (noting Your Honor’s decision to
 5 limit discovery into grossly overbroad requests regarding corporate structure and
 6 employees).

7 **Current Notice Topic 23:** All of Your discussions,
 8 communications, and contacts of any kind, with any
 9 current or former employee of Defendants.

10 This topic should be stricken as irrelevant or limited. The remaining issues in
 11 this case – direct infringement by third parties of Plaintiffs’ copyrighted works, and
 12 Defendants’ statutory damages – do not turn on Plaintiffs’ discussions with
 13 Defendants. To the extent Defendants seek to ascertain whether Plaintiffs have ever
 14 licensed Defendants to use to the Works in suit, this topic fails would be limited
 15 other than to the extent that “defendant are permitted to ask questions regarding
 16 whether plaintiffs have authorized general or unrestricted distribution over the
 17 internet of all or part of plaintiffs’ copyrighted works . . . for which plaintiffs are
 18 claiming defendants infringed.”

19 **IV. The Court Should Award Plaintiffs Their Costs And Attorneys’ Fees**

20 In addition to issuing Plaintiffs’ requested Protective Order, the Court should
 21 award Plaintiffs their costs and reasonable attorneys’ fees incurred in making this
 22 application. The Court awarded costs and reasonable attorneys’ fees in connection
 23 with the First Protective Order, and it should do so again here.

24

25 ⁶ To the extent “entities of any kind” refers to other corporations (such as corporate
 26 affiliates or subsidiaries), such discovery has already been precluded by the First
 27 Protective Order, which limited the definition of “Plaintiffs” to “the named plaintiffs
 28 in this action” rather than other corporations. First Protective Order, at 2.

1 Plaintiffs are entitled to an award of attorneys' fees and costs unless
2 Defendants' position is "substantially justified." Fed. R. Civ. P. 26(c)(3), 37(a)(5);
3 *Green v. Baca*, 225 F.R.D. 612, 614-15 (C.D. Cal. 2005). Here, Defendants'
4 position cannot be said to be substantially justified. As with Defendants' First
5 Notice, Defendants persist in taking discovery on topics that the Court has already
6 held to be irrelevant. Indeed, the case for sanctions is even stronger now than it was
7 in connection with the First Protective Order: Whereas Defendants' First Notice was
8 duplicative of topics in a different (though related) case, Defendants' Second Notice
9 is irreconcilable with a Protective Order that has already been issued in this very
10 case. *See, e.g., Winding v. NDEX West, LLC*, No. 1:10cv02026 AWI DLB, 2011
11 WL 1080650, at *6 (E.D. Cal. 2011) (finding arguments to be not substantially
12 justified because party "reassert[ed] . . . arguments already found lacking by the
13 court"). Accordingly, the Court should award Plaintiffs attorneys' fees and costs.

14 **CONCLUSION**

15 For the foregoing reasons, a protective order in the form of the proposed order
16 should be granted, and Plaintiffs should be awarded their costs and reasonable
17 attorneys' fees incurred in making this application.

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1 Dated: October 1, 2013

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